



No. 82-1972

In the Supreme Court of the United States

October Term, 1982

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MARK HOCHANADEL,

*Petitioner,*

vs.

DETCO TRAILER, INC., and LAWRENCE CORNELL,

*Respondents.*

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RESPONDENTS' BRIEF TO WRIT OF  
CERTIORARI TO THE COURT OF  
APPEALS OF THE STATE  
OF KANSAS

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## **QUESTIONS PRESENTED**

1. Whether there is a protectible property interest in an unaffirmed jury verdict sufficient to raise a federal question under 28 U.S.C. § 1257(3).

2. Whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider an asserted federal question not explicitly the subject of a final judgment by the Kansas Supreme Court where state proceedings are pending.

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**OPINIONS BELOW**

The opinion of the Court of Appeals of Kansas, dated December 30, 1982 (Petitioner's App. A, at A1-A2), is not reported. The opinion of the District Court of Wyandotte County, Kansas, dated October 29, 1981 (Petitioner's App. B, at A3-A7), is not reported. The opinion of the District Court of Wyandotte County, Kansas, dated December 11, 1981 (Petitioner's App. C, at A8-A15), is not reported.

## **JURISDICTION**

The judgment of the Court of Appeals of Kansas (Petitioner's App. A, at A1-A2) was entered on December 30, 1982. A Motion for Rehearing and Rehearing En Banc before the Court of Appeals of Kansas was denied on January 19, 1983 (Petitioner's App. D, at A16). On March 8, 1983, a Petition for Review in the Supreme Court of Kansas was denied (Petitioner's App. E, at A17). The petitioner then sought a petition for a writ of mandamus. (Respondents' App. 1, at A1). This was denied by the Supreme Court of Kansas on June 3, 1983 (Respondents' App. 2, at A2). On June 6, 1983, the petition for certiorari was filed with this Court.

Petitioner predicates jurisdiction in this case on 28 U.S.C. § 1257(3) (1976). The Court does not have jurisdiction of this pending state action under this provision for the reason that there has been no final judgment by the Kansas Supreme Court on any federal question. Moreover, the petition is directed improperly to the Court of Appeals of Kansas rather than to the state's highest court, the Kansas Supreme Court.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. U.S. CONST. amend. XIV. § 1 provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 U.S.C. § 1257(3) (1976) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \*

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

3. KAN. STAT. ANN. § 60-259(a) (1976) provides in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues when it appears that the rights of the party are substantially affected:

\* \* \*

*Third.* That the verdict, report or decision was given under the influence of passion or prejudice.

*Fourth.* That the verdict, report or decision is in whole or in part contrary to the evidence.

\* \* \*

## STATEMENT

This is a personal injury action. Perhaps the best description of this case is the trial court's Journal Entry of Judgment:

The jury has decided that a man who was slightly touched by a truck and who never realized his injuries until almost two years later, injuries that admittedly could have been caused by any number of things, was injured, in fact, due to that slight accident. (Petitioner's App. C, at A11-17).

The jury awarded the plaintiff \$950,000 for this "slight injury" which was reduced to \$855,000 upon comparison of the plaintiff's fault in the accident (Petitioner's App. C, at A12). The trial court found this verdict to be based on passion and prejudice, and outside the range of evidence. The court ordered a remittitur to \$367,888 and ordered a conditional judgment on that amount, provided the plaintiff accept the reduced damages. In the alternative, the court ordered a new trial (Petitioner's App. C, at A14).

The petitioner failed to accept the reduced amount of damages and the trial court ordered a new trial. On appeal of that order, the Kansas Court of Appeals held that the order was not generally appealable as a final order unless challenged on jurisdictional grounds. The court also held that an order for a new trial is beyond a court's jurisdiction if it is granted on grounds not enumerated in KAN. STAT. ANN. § 60-259(a). The court held that the trial court's finding that the verdict was based on passion and prejudice and outside the range of evidence met the third and fourth enumerated grounds for a new trial under that statutory provision (Petitioner's App. A, at A2). Petitioner then appealed to the Supreme Court

of Kansas which denied review (Petitioner's App. E, at A17). Petitioner then sought a writ of mandamus from the Supreme Court of Kansas, directing the trial judge to reinstate the verdict (Respondents' App. 2, at A2). The Supreme Court of Kansas denied the petition for a writ of mandamus (Respondents' App. 1, at A1). On June 6, 1983, the Petition for Certiorari was docketed in this Court.

### **REASONS FOR DENYING THE PETITION**

The Petition for Certiorari should be denied for two reasons. The first is that no federal issue or question is raised by the petition because no cognizable property interest is at stake. The second reason for denying the petition is that no final judgment by the Kansas Supreme Court on the asserted federal issue has been rendered.



## ARGUMENT

### **I. THE PETITIONER WAS NOT DENIED DUE PROCESS OR DEPRIVED OF ANY PROPERTY RIGHT, BECAUSE STATE LAW DID NOT VEST PETITIONER WITH A PROPERTY RIGHT IN AN UNAFFIRMED JURY VERDICT.**

Petitioner urges jurisdiction before this Court based on 28 U.S.C. § 1257(3) (1976). Petitioner asserts that the trial court's application of KAN. STAT. ANN. § 60-259 (a) (1976), which in part allows a trial judge to grant a new trial when a verdict is based on passion or prejudice or is outside the range of evidence, deprived him of a property right in the unaffirmed jury verdict. Because the state appellate courts refused to reinstate this verdict, the petitioner now urges this Court that he has been deprived of property without due process in violation of the fourteenth amendment.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court considered the fourteenth amendment procedural protection of property rights. What is "property" for the purposes of the fourteenth amendment is a matter of state law.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules are understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (looking to Florida law to

find a property interest in the earnings of an interpleader fund).

Kansas law on what may constitute "property" in the framework of litigation is discussed in *Board of Greenwood County Commissioners v. Nadel*, 228 Kan. 469, 618 P.2d 778 (1980). In that case, a partnership successfully appealed an assessment of taxes by Greenwood County to the state board of tax appeals. Under an existing statutory provision, no appeal existed from the determination of the tax board. Subsequent legislation, however, retroactively granted the right of appeal to tax litigants. *Id.* at 470-72.

In determining whether a retroactive application of this statute would disturb a vested right in the tax board's determination, the Kansas Supreme Court noted:

Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. [citation omitted] A vested right is a right so fixed that it is not dependent on any future act, contingency or decision to make it more secure, and a defendant in an action does not acquire a vested right in a judgment dismissing an appeal, but only an inchoate right which will become vested upon the happening of an affirmance by the appellate court by the expiration of the period allowed for appeal.

*Id.* at 473-74. The taxpayers in *Nadel* sought to preserve the tax board's determination by asserting a vested right in the decision. The court held there was no vested right.

In granting the rehearing in this case, this court merely exercised its power of control over pending litigation,

and this was before any final determination had been made. No judgment determining the rights of these litigants has yet passed beyond the control of this court. The cause is still pending and will continue to pend until the mandate goes down. The court, up to that time, has deprived the litigants of no vested right. When a judgment has been pronounced and has become final then and only then have the rights of the defendants been duly disturbed. There is no vested right in a judgment held by the party in whose favor it is rendered so as to preclude its re-examination and vacation in the ordinary modes of appeal provided by law. It is true in this case that this court had previously held that there was no right of appeal in these cases, but the court always has the right and the duty to re-examine its prior decisions.

*Id.* at 474.

In the present case, the petitioner had only an expectation that the jury's verdict would remain undisturbed. Although this case does not concern a retroactive application of a statute, the reasoning of the Kansas Supreme Court in *Nadel* is applicable in determining whether a property interest exists in an unaffirmed verdict that has yet to survive the procedural remedies and appeals that exist to a litigant. It is noteworthy that no final determination had been made in *Nadel* and, therefore, no vested right could exist. Similarly, in the present case, because the grant of a new trial is not a final order under Kansas procedure, *Brown v. Fitzpatrick*, 224 Kan. 636, 585 P.2d 987 (1978), a final determination had not been made to vest the petitioner with a property right. Therefore, the petitioner did not have a vested right in the untested jury verdict.

As the Court in *Roth* noted, "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that a person has already acquired in specific benefits." 408 U.S. at 576. The Court went on to note that property interests protected by procedural due process have certain attributes.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

*Id.* at 577.

Essentially, the petitioner had no more than a unilateral expectation that the jury verdict would not be subjected to a remittitur or reversal on appeal. The only reliance interest that is created when a person files a lawsuit is that it will be fairly decided at a hearing.

In this case, the petitioner's claims were adjudicated fully at both the trial and appellate levels. The trial court exercised its discretion in ordering a remittitur or new trial, and the state appellate courts affirmed that order. Dissatisfied, the petitioner sought a second bite of the apple by seeking a writ of mandamus which was denied. Now the petitioner seeks a third bite by appealing to this Court. From the foregoing, it is apparent that the petitioner was not deprived of any property right because no property existed in the untested jury verdict as a matter of state law.

**II. A FINAL JUDGMENT ON A FEDERAL QUESTION HAS NOT BEEN RENDERED BY THE KANSAS SUPREME COURT WITHIN THE MEANING OF 28 U.S.C. § 1257.**

Jurisdiction before this Court to consider a writ of certiorari is predicated on a final judgment on a federal question by the highest court of a state. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court recognized 28 U.S.C. § 1257 as a restriction of its appellate jurisdiction on cases coming from the state courts.

The court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State."

*Id.* at 477 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)).

The Court, however, recognized four categories of cases that were exceptions to this general rule. It further noted that in most of these categories, additional state proceedings would not require the decision of other federal questions that also might require review by the Court at a later date. *Id.* at 477. It is noteworthy that in all of these cases, there must be a state court decision on a federal issue before the Court will consider an appeal while state proceedings are pending. Obviously, in order for there to be a state adjudication on a federal issue the state courts necessarily must have considered that issue. The Kansas Supreme Court, however, only considered whether the order to grant a new trial had been issued properly. No constitutional issue had been raised in the normal ap-

pellate review below as to whether the petitioner had been denied due process or deprived of a property interest.

After the Kansas Supreme Court denied the petitioner's petition for review on the trial court's order for a new trial, the petitioner then sought a writ of mandamus in the Kansas Supreme Court to direct the trial court to do what the petitioner had failed to achieve in his petition for review. In his petition for a writ of mandamus, the petitioner raised for the first time the issue before this Court—that the trial court deprived the petitioner of property without due process by ordering a remittitur or new trial. Respondent can only assume that the Kansas Supreme Court did not consider these arguments for the reason that the petitioner improperly used a mandamus action as a substitute for an appeal already pursued. See *Gray v. Jenkins*, 183 Kan. 251, 254, 255, 326 P.2d 319 (1958) (holding that a writ of mandamus is not a substitute for appeal and may not issue in any case where there is a plain and adequate remedy in the ordinary course of the law).

Thus, it is apparent from the foregoing that the Kansas Supreme Court never ruled on the asserted federal issue that the petitioner now raises before this Court because it was not properly raised below.

For the foregoing reasons, the Court should not exercise jurisdiction under 28 U.S.C. § 1257(3).

### CONCLUSION

The petitioner has failed to assert a property interest sufficient to constitute a deprivation of property rights protected by the fourteenth amendment. Even if there is a property interest in an untested jury verdict, further state proceedings may obviate the necessity for a decision on the asserted federal issue at this time.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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**APPENDIX**

**APPENDIX 1**

IN THE SUPREME COURT OF THE STATE  
OF KANSAS

No. 83-55734-S

MARK HOCHANADEL,  
Appellant,

v.

DETCO TRAILER, INC., and  
LAWRENCE R. CORNELL,  
Appellees.

**DENIAL OF PETITION FOR WRIT OF MANDAMUS**

(Filed May 24, 1983)

You are hereby notified of the following action taken  
in the above entitled case:

Petition for a writ of mandamus.

Denied.

Yours very truly,

Lewis C. Carter,  
Clerk, Supreme Court

Dated June 3, 1983.



**APPENDIX 2**

**IN THE SUPREME COURT OF THE STATE  
OF KANSAS**

No. 83-55734-S

**MARK HOCHANADEL,**  
Appellant,

v.

**DETCO TRAILER, INC., and  
LAWRENCE R. CORNELL,**  
Appellees.

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PETITION FOR MANDAMUS**

Petitioner, Mark Hochanadel, respectfully petitions this Court to compel Respondent, The Honorable Cordell D. Meeks, Jr., to vacate such Respondent's Order of November 20, 1981 in the cause styled *Mark Hochanadel v. Detco Trailer, Inc. and Lawrence R. Cornell* No. 78-C-1323, and to reinstate the jury verdict for Petitioner in the amount of Eight Hundred Fifty-five Thousand (\$855,000.00) Dollars. That Order of November 20, 1981 directed a remittitur or in the alternative a new trial. Petitioner rejected such remittitur and a new trial was ordered. A pretrial conference has been scheduled for May 26, 1983 with respect to that new trial.

Petitioner further petitions this Court to compel Respondent The Honorable Cordell D. Meeks, Jr. to stay all proceedings with regard to the new trial pending the outcome of this matter in mandamus; and requests that the disposition of this matter be expedited.

*Preliminary Statement*

In July, 1981 a jury trial was had on Petitioner's personal injury action against Respondents Lawrence Cornell and Detco Trailer, Inc. in the District Court of Kansas for Wyandotte County in the cause styled *Mark Hochanadel v. Detco Trailer, Inc. and Lawrence R. Cornell*, No. 78-C-1323. The Honorable Cordell D. Meeks, Jr., Respondent herein, was presiding judge. Following that trial the jury returned a unanimous verdict in favor of Petitioner against Respondents Lawrence Cornell and Detco Trailer, Inc. The jury assessed Petitioner's net recovery against those two Respondents at Eight Hundred Fifty-five Thousand (\$855,000.00) Dollars. Respondent The Honorable Cordell D. Meeks, Jr. on July 24, 1981 entered a judgment on such verdict (see Exhibit "B" attached to Petition for Mandamus).

Subsequently, Respondents Lawrence Cornell and Detco Trailer, Inc. made a Motion for New Trial, or in the Alternative, Motion for Remittitur. Such Motion was argued to the District Court on August 17, 1981 and on October 29, 1981 Respondent The Honorable Cordell D. Meeks, Jr., by memorandum decision, ordered a remittitur of the verdict to Three Hundred Sixty-seven Thousand Eight Hundred Eighty-eight and 50/100 (\$367,888.50) Dollars. Respondent The Honorable Cordell D. Meeks, Jr. cited, as the basis for the remittitur ordered, his feeling that the verdict was outside the range of the evidence (see Exhibit "A" attached to the Petition for Mandamus).

On November 12, 1981 Respondents Lawrence Cornell and Detco Trailer, Inc. moved to modify Respondent The Honorable Cordell D. Meeks, Jr.'s memorandum decision of October 29, 1981 to reflect an alternative order for new trial if Petitioner rejected the remittitur. Petitioner then moved to strike Respondents Lawrence Cornell and Detco

Trailer, Inc.'s motion to modify, and to reinstate the verdict. Such motions were argued to the District Court on November 18, 1981. At that hearing Petitioner argued that Respondent The Honorable Cordell D. Meeks, Jr. deprived Petitioner of property without due process of law by improperly ordering the remittitur. On November 20, 1981 Respondent The Honorable Cordell D. Meeks, Jr. issued another order granting Respondents Lawrence Cornell and Detco Trailer, Inc. a new trial in the event Petitioner rejected the remittitur, and finding that the jury was influenced by passion and prejudice. Thereafter, on December 11, 1981 Respondent The Honorable Cordell D. Meeks, Jr. filed his Journal Entry of Judgment reflecting that Order of November 20, 1981 (see Exhibit "B" attached to Petition for Mandamus).

On November 25, 1981, Petitioner filed his original Notice of Appeal in the Court of Appeals of Kansas. Respondents Lawrence Cornell and Detco Trailer, Inc. filed their Notice of Cross-Appeal on December 11, 1981. Petitioner's refusal to accept remittitur was filed on December 21, 1981, as was Petitioner's Amended Notice of Appeal in the Court of Appeals of Kansas. Respondent The Honorable Cordell D. Meeks, Jr. then ordered a new trial.

In his appellate brief Petitioner contended that Respondent The Honorable Cordell D. Meeks, Jr. was without jurisdiction to enter his order directing a remittitur or in the alternative a new trial, in that said Respondent failed to comply with the substantive requirements of Kansas law, namely K.S.A. 60-259 as interpreted by the Supreme Court of Kansas. The Court of Appeals of Kansas on December 30, 1982 dismissed Petitioner's appeal on the ground that Respondent The Honorable Cordell D. Meeks, Jr.'s order complied with Kansas law, was within his

jurisdiction, and was not appealable as of right (see Exhibit "C" attached to Petition for Mandamus).

Subsequently, on January 10, 1983 Petitioner made a Motion for Rehearing and Rehearing En Banc before the Court of Appeals of Kansas. That Motion was denied on January 19, 1983. On January 31, 1983 Petitioner filed a Petition for Review in this Court requesting it to review the decision of the Court of Appeals of Kansas rendered on December 30, 1982. That Petition for Review was denied on March 8, 1983.

Respondent The Honorable Cordell D. Meeks, Jr. has scheduled a pretrial conference, with respect to the new trial in this cause for May 26, 1983.

*Point Relied On*

THIS COURT SHOULD ISSUE AN ORDER IN MANDAMUS COMPELLING RESPONDENT THE HONORABLE CORDELL D. MEEKS, JR. TO VACATE HIS ORDER GRANTING A NEW TRIAL AND TO REINSTATE THE ORIGINAL VERDICT AND JUDGMENT THEREON, BECAUSE RESPONDENT THE HONORABLE CORDELL D. MEEKS, JR. ENTERED SUCH ORDER WITHOUT JURISDICTION THEREBY DEPRIVING PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE PETITIONER HAS NO ADEQUATE REMEDY AT LAW BY APPEAL OR BY MANDAMUS IN A COURT OF PROPER CONCURRENT JURISDICTION, AND TO CORRECT THE ORDER OF RESPONDENT THE HONORABLE CORDELL D. MEEKS, JR. TO ASSURE THAT IT IS JUST, LEGAL, AND FREE OF ABUSE.

\* \* \*

### B. *Violation of Due Process.*

As detailed above, by entering his Order directing a remittitur or in the alternative a new trial, Respondent The Honorable Cordell D. Meeks, Jr. was acting as a thirteenth juror in excess of his jurisdiction. Petitioner has a property right in the jury verdict and judgment thereon which is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. That clause provides that no state shall deprive a person of property without due process of law. Yet Respondent The Honorable Cordell D. Meeks, Jr. has done exactly that by directing a remittitur or in the alternative ordering a new trial while lacking jurisdiction to do so.

This clearly violates the due process requirement that Petitioner be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U. S. 371, 378, 98 Sup. Ct. 780, 785 (1971). Due process expresses the requirement of fundamental fairness. *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 101 Sup. Ct. 2153, 2158 (1981). The United States Supreme Court traditionally has held that the due process clause protects civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 102 Sup. Ct. 1148, 1154 (1982). It is evident in this situation that Respondent The Honorable Cordell D. Meeks, Jr., by acting without jurisdiction in ordering a remittitur or in the alternative a new trial denied Petitioner a meaningful opportunity to be heard and was in violation of fundamental fairness.

\* \* \*